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IN THE

Supreme Court of the United States

October Term, 1969

No. 573

JAMES A. WATTS and WALTER B. BLUE, *Petitioners*

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION APPEAL HEARING COMMITTEE, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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I.

THE DECISION OF THE ALASKA SUPREME COURT RESTS ON AN ADEQUATE, NON-FEDERAL GROUND.

In passing upon this case after the second remand from the Supreme Court of the United States, 391 U.S. 592 (1968), the Supreme Court of Alaska reaffirmed its prior determination that Petitioners Watts and Blue violated Regulation E-7 of the Seward School Board, and that this was a sufficient, independent ground for their nonretention. *Watts v. Seward School Board*, 454 P.2d 732,37 (Alaska 1969); Regulation E-7 provided:

> Grievances, complaints and communications from employees shall be submitted to the Board through the Superintendent. Any employee or group of employees may at any time appeal to the Board.

It is uncontested that Petitioners simultaneously delivered copies of their "Open Letter to the Seward School Board" to the Superintendent, members of the School Board, and the public, in substantial violation of Regulation E-7. App. 74-75, 186, 198-99. [1]

Petitioners have attempted to attack this finding in several ways. First, they have alleged that Regulation E-7 was not properly adopted, and therefore its violation may not serve as a ground for nonretention. The State Board of Education Appeals Hearing Committee and the Alaska Supreme Court, however, found that there was sufficient evidence to infer that the Regulation had properly been adopted by the Seward School Board, that at the relevant time it was a valid regulation within the school system, and that Petitioners had contractually agreed to abide by that regulation. App. 24-25, 73-74. The Alaska Supreme Court reaffirmed this determination after a thorough and independent review of the evidence. 454 P.2d 732,37. In addition, Regulation E-7 was

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1 "App." refers to the joint Appendix filed by the parties in No. 325, October Term, 1967. Petitioner has filed a motion to use that record in this case, and Respondent hereby joins in that motion.

contained in a handbook of regulations which was distributed to all the teachers in the Seward School system, and Petitioners were personally familiar with Regulation E-7. App. 178 (Blue), 208 (Watts); 74.

Second, Petitioners have attempted to raise constitutional objections to Regulation E-7. They now argue that it is both vague and overbroad, and on those bases constitutionally defective. This argument was originally advanced, however, in a petition for rehearing after the Supreme Court of Alaska had rendered its second decision in this matter. App. 119-122. At that time the Supreme Court of Alaska held that it would not consider new arguments raised in a petition for rehearing, which had not been briefed and argued in accordance with that Court's rules. App. 122-25. This holding was reaffirmed by the Alaska Supreme Court after the second remand from this court. 454 P.2d 732,37. It is well established law in this Court that reasonable restrictions on the methods of raising constitutional arguments are valid, and the failure to comply with those restrictions will bar a party from resorting to those arguments. *E. G. Williams v. Georgia*, 349 U.S. 375 (1955); *Michel v. State of Louisiana*, 350 U.S. 91, 97 (1955). In this case the Supreme Court of Alaska has adopted a procedural rule requiring a party to raise all of its points on appeal in the first argument of the case, rather than holding some in reserve to be used in a potential petition for rehearing. This requirement has been uniformly applied in other cases. *Sanuita v. Common Laborer's Union*, 402 P.2d 199, 201 (Alaska 1965); *Pollastrine v. Severance*, 375 P.2d 528, 31 (Alaska 1962). Since this type of requirement obviously promotes the just and expeditious disposition of causes, it is submitted that this procedural requirement of the Alaska Supreme Court is a valid restriction upon Petitioner's right to advance arguments concerning any potential constitutional infirmities in Regulation E-7.

In their brief filed with the Alaska Supreme Court after the second remand from this Court, Petitioners attempted to argue that the decision making process through which Petitioners were dismissed was unconstitutional. In their one paragraph argument, however, they cited no cases other than those cited by this Court in the *Pickering* case, 391 U.S. 563, 68, N. 2 (1968). The Alaska Supreme Court, in its

consideration after remand, refused to consider this argument on the same ground that it had refused to consider previous arguments concerning the constitutionality of Regulation E-7; i.e., that it was not timely presented. *Watts v. Seward School Board*, 454 P.2d 732,37.

II.

THE QUESTIONS RAISED IN THE PETITION ARE NOT OF SUFFICIENT CONSTITUTIONAL STATURE TO JUSTIFY GRANTING CERTIORARI

A. This court should allow future decisions to clarify the various considerations involved before laying down further guidelines for the decision of cases requiring a court to balance the interest of employees in exercising their right to freedom of speech, and the State, as the employer, in assuring an efficient civil service.

In *Pickering vs. Board of Education*, 391 U.S. 563 (1968), this Court clearly recognized the myriad factual situations which might arise in attempting to define the rights of public employees in the exercise of their rights under the First Amendment. *Id.* at 568-69. Thus, this Court specifically refrained from laying down a firm rule under which all cases in this area must be decided, but rather held that each case must be adjudicated on its own merits, and the interests of the employee and the State balanced in each instance.

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568.

In response to the *Pickering* decision, a number of courts have re-thought their position in this area. *Puentes v. Board of Education,* N.Y. (1969); *Meehan v. Macy*,

392 F.2d 822 (1968). Their decisions further illuminate the many complexities and differing factual situations which may arise, and it is submitted that this Court should allow this process of illumination to continue through lower court decisions. *C.f., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70,77 (1955). Then, after a sufficient body of experience has developed, this Court may take the opportunity to refine its formulation of the rule governing the accommodation of the First Amendment to public employment. To do so now, however, would be to proceed without the benefit and assistance which the decisions of other courts would provide.

B. A decision in this case would be of importance only to the litigant, and not to the public in general.

As this Court observed in its first remand of this case to the Alaska Supreme Court, the statutory law of Alaska under which Petitioners were non-retained has been significantly altered since their nonretention. App. 42-43. It has, in fact, been altered in such a manner that it would be impossible for the situation presented by Petitioners to arise again. A.S. 14.20.170(a)(2); 14.20.095. (See Appendix "A"). Since Petitioners would be the only people who could conceivably be directly affected by a decision in this case, the decision would be without public importance. In such a situation, certiorari should be denied. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387,93 (1923).

In addition, since the *Pickering* case laid down the general considerations relevant to decision in that and similar cases, a decision in this case would not have significant value as precedent for the decision of future cases. Thus, the affect of any decision in this case would be even further restricted, and even less "public". It is well established law in this Court that certiorari is not granted merely to decide interesting intellectual problems, or even to decide limited controversies. Rather, the policies governing the issuance of a writ of certiorari are designed to reserve this Court's time and attention for problems of broad significance. *Rice v. Sioux*

City Memorial Park Cemetery, supra, at 74. In the area of the right of free speech enjoyed by public employees, the broad and significant question has been decided by the *Pickering* case. To grant certiorari here would be of such limited significance that the writ should be denied.

III.

THE DECISION OF THE ALASKA SUPREME COURT IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

In the *Pickering* decision, this Court considered four different factors in evaluating the State's interest in regulating Mr. Pickering's freedom of speech. After this consideration, of course, it concluded that the State had no sufficient interest in such regulation and struck down Pickering's dismissal. When *Watts vs. Seward School Board* was remanded to the Alaska Supreme Court to be considered in the light of *Pickering*, the Alaska Supreme Court faithfully carried out the mandate of this Court. Since Pickering, Watts and Blue were all high school teachers, it seems likely that whatever potential State interest there is in regulating the freedom of speech of these employees would be the same in both cases. Thus, the Alaska Supreme Court evaluated the State interest in regulating the conduct of Watts and Blue by considering the same issues and problems considered by this court when it decided *Pickering*. After such reconsideration, the Alaska Supreme Court held that the nonretention of Petitioners Watts and Blue was justified.

The issues considered by the Alaska Supreme Court are as follows:

1. Whether or not the statements by Watts and Blue would interfere with the close, working relationships and harmonious functioning of the school system.

2. Whether or not the issues raised by Watts and Blue were of general public concern.

3. Whether or not the Seward School Board could have

easily refuted Petitioners' accusations by references to the public record.

4. The public reaction to the accusation of Watts and Blue.

In *Pickering* it was determined by this Court that Pickering's statements were not directed at co-workers or immediate superiors; that the issues discussed by Pickering were of general public concern, since they were the subject of a local election; that his false statements were easily refutable by the school board by a simple reference to the public record; and that the public reaction to Pickering's statements was one of marked apathy. The Alaska Supreme Court, after an independent review of the record, 454 P.2d 732,37, determined that the situation presented by Petitioners was precisely the opposite of the *Pickering* case in each of these four respects.

Since this Court, while reserving to itself the right to make an independent examination of the record, always accords great, if not controlling, weight to factual determinations of the state courts, *Pickering v. Board of Education*, *supra* at 578, n.2, and will only make an independent review of the record where it appears that a flagrant abuse of the First Amendment rights would otherwise occur, *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287,94 (1940), certiorari should be denied. The factual determinations made by the Alaska Supreme Court, after its independent review of the record, give no indication that a flagrant abuse of First Amendment rights has taken place, and, in the absence of such abuse, this court should accept the determinations of the Alaska Supreme Court. Once this is done, it is clear that *Watts* presents an entirely different situation from *Pickering*.

In *Pickering*, this Court determined that the State of Illinois had no greater interest in regulating Pickering's speech than it did in regulating the speech of its citizenry as a whole. In this case, however, the state interest in regulating the speech of Petitioners is substantially stronger than Alaska's interest in regulating the speech of its citizenry as a whole. As this Court observed, the State has a significant

interest in assuring the smooth and harmonious functioning of its Civil Service.

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.

Pickering v. Board of Education, supra, at 568. To this end, one of the considerations which must be weighed is the extent to which the Petitioners' speech concerned people with whom they had every day working contact. In this case, the statements made by Petitioners Watts and Blue concerned the Superintendent of Schools, who performed essentially the same functions as the principal would in a larger school system. 454 P.2d 732, 35. In the Seward schools Petitioners had constant contact with the Superintendent, and worked closely with him to fulfill the educational needs of the community. After independently reviewing the record, the Alaska Supreme Court determined that the statements made by Petitioners concerning the Superintendent would interfere with the close working relationship which had existed previously. *Id.*

In *Pickering* the statements made concerned an issue which had been placed before the electorate during a municipal school bond election. In *Watts*, on the other hand, the statements made directly concerned the job performance of the Superintendent of Schools. App. 56-60. Whether or not to retain the Superintendent of Schools is not a question which would ever come before the electorate of Seward, since the Superintendent served at the pleasure of the Seward School Board. Since this was not a matter upon which, in the normal process of democratic decision making, the electorate of Seward would pass, the Alaska Supreme Court determined that the State's interest in regulating the speech of Petitioners, as opposed to the need for informed public discussion, was significantly more important than it had been in *Pickering*. 454 P.2d 732, 35. Similarly, it should be observed that the regulations the State imposed upon Petitioners would tend to promote informed debate among members of the school

board, the group with decision making power in this instance, even though it may have temporarily curtailed public discussion of the issue.

In *Pickering*, this Court observed that the matters which Pickering misstated could have been easily refuted by the School Board through references to the public record.

> The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the school that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts.

Pickering v. Board of Education, supra, at 572. In this case, however, the matters complained of dealt precisely and exclusively with

> . . . matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts.

Id. In this situation, the careless falsehoods of Petitioners could do substantially more harm to the efficient operation of the school system than could the accusations of Pickering.

Lastly, in *Pickering* the public reacted only apathetically to Pickering's accusations. In *Watts*, however, the reaction was quite different. This was the initial phase of a campaign to have the Superintendent of Schools dismissed, and occasioned a substantial amount of public discussion. App. 182 (Blue); 160-61, 454 P.2d 732,37. Thus, it is clear that this is not a case, such as *Pickering*, where nonretention was based merely upon the injured feelings of those against whom the public discussion was directed.

On all these counts the interest in the State of Alaska regulating the speech of Petitioners is substantially greater

than the interest of the State of Illinois in regulating the speech of Mr. Pickering. Thus, after balancing these interests against the interest of Petitioners in being able to *immediately* make their grievances public, rather than taking the minimal amount of time necessary to comply with Regulation E-7, this Court should deny certiorari on the ground that the decision by the Alaska Supreme Court is consistent with the prior decisions of this Court, and with Pickering. [2]

CONCLUSION

For the foregoing reasons and on the strength of the foregoing authorities, Respondent prays that certiorari be denied.

Respectfully submitted,

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Dated: January 7, 1970

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In opposition to the second petition for certiorari filed in this case Respondents also argued that the decision of the Alaska Supreme Court was consistent with prior decisions of this Court. The issues covered there have, however, receded considerably in importance since *Pickering*, and will therefore only be covered by reproducing the relevant portion of Respondents' previous brief in Appendix "B".

APPENDIX A

A.S. 14.20.095

Right to comment and criticize not to be restricted. No bylaw or regulation of the commissioner of education, a school board, or local school administrator may restrict or modify the right of a teacher to engage in comment and criticism outside school hours, regarding school personnel, members of the governing body of any school or school district, any other public official, or any school employee, to the same extent that any private individual may exercise the right.

A.S. 14.20.170

Dismissal. (a) A teacher, including a teacher who has acquired tenure rights, may be dismissed at any time only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent.

(b) A teacher may be suspended temporarily with regular compensation during a period of investigation to determine whether or not cause exists for the issuance of a notification of dismissal according to §180 of this chapter.

APPENDIX B

THE DECISION OF THE SUPREME COURT OF ALASKA IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT

The Supreme Court of Alaska did not base its decision on the abstract proposition that public employment is a privilege not a right, nor on the theory that the power to withhold employment entirely includes the power arbitrarily to place conditions on employment when granted. Instead, the court held that the Seward School Board was justified in not renewing petitioners' contracts because their activities brought them and the teaching profession into public disgrace and undermined the morale and discipline of the local school system. Petitioners' discharge was sustained because of the specific finding that their activities threatened to impair the efficiency and integrity of the school system. This is an interest recognized by this Court in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947) as justifying restrictions on the otherwise constitutionally guaranteed rights of speech and association of government employees " 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." 330 U.S. at 102. Even the state cases which petitioners assert to reflect constitutional philosophy antithetical to that of the Supreme Court of Alaska, have recognized the compelling interest of state agencies in preserving an efficient, harmonious internal administration. E.g., *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385, 389 (1964), where the Court stated:

> A strong case, we think, can also be made for the view that permitting a public employee to run or campaign against his own superior has so disruptive an effect on the public service as to warrant restriction.

In the case at bar there can be no doubt of the divisiveness of petitioners' conduct.[2] Since petitioners do not dispute the conclusion of the school board that they engaged in activities damaging to their own and to their

employer's professional prestige, it can only be assumed that they are arguing that in spite of their disruptive conduct which threatened to impair the efficiency and destroy the integrity of the school system, they cannot be denied employment within the school. This claim is without merit.

Moreover, petitioners' false statements for which they were dismissed are not entitled to constitutional protection since they were made with reckless disregard for truth. The Supreme Court of Alaska stated:

> The production and distribution of the Open Letter was a time-consuming and deliberate act. The false statements contained in it were not made in heated debate. The factual basis for the charges could have been verified by appellants if they had taken the time to do so.

421 P.2d at 607. Those are the elements of recklessness which, as noted by the Supreme Court of Alaska, renders a statement beyond constitutional protection. *Cf. Garrison v. Louisiana,* 379 U.S. 64, 75 (1964).

Nor is the statute under which petitioners were non-retained unconstitutionally vague or overbroad. The phrase, "conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect" was intended to be a "catch-all", serving the same purpose as phrases such as "conduct unbecoming a teacher" or "unprofessional conduct". 421 P.2d at 590. These phrases do cover a broad range of conduct; necessarily so because no statute could be framed to include with specificity all of the particular acts which might render a teacher unfit. The necessity of using a broad standard for dismissal is indicated by the

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[2] *E. g.* In an attempt to discredit the superintendent, petitioner Blue in May or June of 1959 contacted and questioned at least three residents of the town where the superintendent had previously served concerning his character, administrative policies and personal habits while serving there. 421 P.2d at 599.

fact that this technique is used in many states and by the Federal Civil Service.[3]

In attacking the constitutionality of such a technique, petitioner has misunderstood the fundamental difference between statutes which impose prior conditions on employment (oaths) or which prohibit specific activities (a county charter as cited in *Fort* case)[4] and statutes authorizing dismissal for cause with the right of a hearing. All of the cases petitioner cites deal with either prior conditions or specific acts that are prohibited. The constitutional defect in laws such as the county charter in the *Fort* case is plain. Specified kinds of political activity are prohibited; any hearing the employee gets is only to see if he engaged in the prohibited activity. There is no judicial determination that his particular activity actually interfered with the internal functioning of the agency. Similarly, the requirements of an oath that an employee has never been a member of a political party is too broad and at times vague because, again the only question the employee can litigate is whether he signed the oath, or whether he was a member of a group. He has no chance to show that his membersip was innocent or that he personallv did or does not share the

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[3] 5 U.S.C. §652 (a) (1965) reads:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service. . . .

See statutes cited in Beilan v. Board of Educ., 357 U.S. 399, 406 n.8 (1958) and accompanying text.

[4] > No officer or employee of the county in the classified civil service shall directly or indirectly make, solicit, or receive or be in any manner concerned in making, soliciting or receiving any assessment, subscription, or contribution for any political party or any poltiical purpose whatsoever.

Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385, 386 (1964).

illegal aims of the group. In such laws, the legislature has made the judgment that anyone who engages in the activity or fails to sign the oath, regardless of the actual circumstances, is unfit for public employment. This legislative judgment is what courts review when striking down the laws for vagueness or overbreadth. These laws must be drawn narrowly to assume that anyone who does engage in the activity will be actually unfit.

It is clear that when a hearing is granted under a "catch-all" phrase the question to be determined is unfitness in fact. In a dismissal hearing for "good cause" a court rather than determining whether the employee did any specific act which may or may not bear relationship to his ability to serve effectively must determine that the employee's actions render him unfit. In "dismissal for cause" cases the legislature has not made any judgment that a particular act renders an employee unfit. The legislature instead has entrusted agencies and courts with the task of finding whether a particular employee's actions constitute good cause for dismissal. This is a very specific procedure.

In the few cases where such a dismissal procedure has been attacked for vagueness or overbreadth it has been upheld.

In *Board of Educ. v. Swan*, 41 Cal. 2d 546, 261 P.2d 261, 266 (1953), *cert. denied*, 347 U.S. 937 (1954) the Court rejected an attack on the standard "unprofessional conduct" as being void for vagueness, with the following statement:

> As was said in the Goldsmith case, 66 Cal. App. at page 168, 225 P. at page 787: '. . . the calling (of a teacher) is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment . . . the teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wis-

dom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all these things be provided for and offenses against them be particularly specified in a single statute?

The question of vagueness, appears to be governed by *Beilan v. Board of Educ.*, 357 U.S. 399 (1958). In that case a teacher was dismissed under the disqualifying ground of "incompetency." His offending conduct was refusing to answer questions propounded by his superior in private concerning his possible association with communist groups. The teacher's contention that due process of law was violated by including his refusal to answer within the term "incompetency" was rejected by the Court. The Court mentioned that the Pennsylvania statute under which he had been dismissed, "unlike those of many other States, contains no catch-all phrase, such as 'conduct unbecoming a teacher,' to cover disqualifying conduct not included within the more specific provisions." 357 U.S. at 406. By inference then, it would have been constitutionally permissable to have dismissed the teacher under a catch-all standard. The Court proceeded to note that the term "incompetency" had been broadly interpreted by the Pennsylvania Court and that its dictionary definition was not particularly prescriptive. Since this was so, the Court held, the extension of the term "incompetency" to include the teacher's refusal to answer was not inconsistent with the United States Constitution.

The basic teaching of *Beilan* and *Swan* is that statutes setting forth all possible legitimate grounds for non-retention of teachers cannot be drafted. Because of this fact the use of general standards in non-retention statutes is constitutionally permissible.

CONCLUSION

For the foregoing reasons respondent prays that the petition for certiorari be denied.

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Dated: August 2, 1967